

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBERS:
97-0085 ST, 97-0086 ST, 97-0087 ST, 97-0088 ST
Sales & Use Tax
For Tax Period: 1993 Through 1996**

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ISSUES

I. Sales & Use Tax – Aloe Vera Juice and Flavored Tea

Authority: IC 6-2.5-5-20; 45 I.A.C. 2.2-5-39; 45 I.A.C. 2.2-5-40

Taxpayer protests the imposition of sales and use tax on the sales of aloe vera juice and products containing tea.

II. Sales & Use Tax – Installation Charges

Authority: 45 I.A.C. 2.2-1-1; Sales Tax Division Information Bulletin #46

Taxpayer protests the imposition of sales tax on installation charges.

III. Sales & Use Tax – Projection Method

Taxpayer protests the calculation used in the projection method.

IV. Sales & Use Tax – Freight

Authority: Sales Tax Division Information Bulletin #1

Taxpayer protests the imposition of sales tax on freight.

V. Sales & Use Tax – Duplicate Invoices

Taxpayer protests the duplication of invoices used in the projection method.

VI. Sales & Use Tax – Credit

Taxpayer protests the Department denying credit for sales tax paid.

VII. Tax Administration – Penalty

Authority: I.C. 6-8.1-10-2.1

Taxpayer protests the imposition of a penalty.

STATEMENT OF FACTS

This Letter of Finding involves Company W and three of its subsidiaries which were liquidated and became divisions of Company W during the audit period. The businesses included retail merchants and warehouse and distribution centers. These businesses will be referred to collectively as “taxpayer” throughout the Letter of Findings.

Various sales and use tax adjustments were made upon an audit completed for years 1993 through 1996. Taxpayer protests several of these adjustments. Additional facts will be provided below, as necessary.

I. Sales & Use Tax – Aloe Vera Juice and Flavored Tea

DISCUSSION

Taxpayer was assessed sales tax on aloe vera juice and flavored tea drinks. Taxpayer protests these assessments and claims they were exempt from sales tax.

Aloe Vera Juice:

The auditor assessed sales tax on aloe vera juice (which contains one hundred percent juice) because it was sold in the pharmacy section. The auditor states that no statutory exemption existed for juice produced from aloe vera.

Vegetables and vegetable products (which include vegetable juices) are exempt pursuant to IC 6-2.5-5-20 and 45 I.A.C. 2.2-5-39. The taxpayer argues that aloe vera can be classified as a vegetable and

submits the definition, from *New World Dictionary, Second College Edition, 1972*, which states “(1) any plant, as distinguished from animal or inorganic matter, and (2) the edible part of such a plant...” Taxpayer argues that as this is 100% aloe vera juice and aloe is a vegetable, this should be exempt from sales tax. Taxpayer argues the positioning of the aloe vera juice in the pharmacy section does not make an exempt item nonexempt.

The Department contacted Purdue University’s Agriculture/Horticulture Department to determine the classification of aloe. The Department was informed that aloe is considered a plant but not a vegetable. The Department further finds the marketing for aloe is typically that of a dietary supplement which claims remedies for various ailments including burns, stomach irritations, and weak immune systems. The Department declines to classify aloe as a vegetable and determines it is a dietary supplement. Pursuant to Department Regulation 45 I.A.C. 2.2-5-40, tonics, vitamins and dietary supplements, in any form, are taxable items.

Flavored Tea Drinks:

Taxpayer protests the assessment of sales tax on tea drinks. The taxpayer argues that under IC 6-2.5-5-20(b)(10), tea is exempt from sales tax as a food for human consumption. Tea is exempt. However, tea products are not exempt and a tea drink is a tea product. Actually, a tea drink is a beverage similar to soft drinks and sodas. Under IC 6-2.5-5-20(c)(4), soft drinks, sodas and other similar beverages are not food for human consumption and therefore not exempt from tax.

FINDING

Taxpayer is denied with respect to both the aloe vera juice issue and the flavored tea drinks issue.

II. Sales & Use Tax – Installation Charges

DISCUSSION

The auditor assessed sales tax on installation charges for items such as telephone systems, conveyors and material handling equipment. The auditor deemed the installation charges were part of unitary transactions and subject to sales tax. The auditor cited Department Regulation 45 I.A.C. 2.2-1-1(a) which states in part:

A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

“‘The total combined charge or selling price’ includes all bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or any other services performed in respect to the property transferred, prior to, or contemporaneous with delivery of the property.” Sales Tax Division Information Bulletin #46.

The taxpayer contends the installation charges were not part of unitary transactions as the installation charges were separately negotiated and stated from materials and any additional costs on each invoice. Taxpayer argues the installation charges were distinct from the sale of tangible personal property. Taxpayer claims it “separately negotiated a fee for the installation of the tangible personal property from the purchase of the tangible personal property.” (Taxpayer’s Brief p.4). Taxpayer states separate vendors often provided the installation depending on the price and efficiency of using a third party.

The Department finds separately negotiated contracts, separately stated on one invoice do not constitute unitary transactions which would subject the installation or labor charges to tax. The taxpayer has stated in it’s protest brief that the installation charges were separately negotiated.

FINDING

Taxpayer’s protest is sustained. Taxpayer has illustrated the installation charges were separately stated on the invoices and states the charges were separately negotiated.

III. Sales & Use Tax – Projection Method

DISCUSSION

Due to the large number of invoices the auditor utilized a projection method. Taxpayer argues the inclusion of the subsidiaries into the parent company’s projection was inaccurate. Taxpayer states the subsidiaries were separately computed prior to their merger with the parent company and the inclusion of the subsidiaries in the pool for the projection of error for expenses for the parent company after the merger was incorrect. Taxpayer argues a more accurate determination of use tax due by the parent company would be attained by treating each division separately throughout the assessment period.

FINDING

Taxpayer’s protest is sustained pending the availability of division-specific information.

IV. Sales & Use Tax – Freight

DISCUSSION

Taxpayer claims freight costs associated with the purchase of advertising circulars were included in a projection of use tax due for all Indiana stores. Taxpayer cites the Department's Sales Tax Division Information Bulletin #1 and claims the freight costs are exempt from tax. Information Bulletin #1 provides that delivery charges separately stated with F.O.B. origin are not taxable. This is because the seller is paying the delivery charges on behalf of the buyer and being reimbursed. Otherwise, the transaction cannot be "F.O.B. origin." Taxpayer has offered worksheets detailing the freight and copies of invoices.

FINDING

Taxpayer's protest is sustained pending Audit verification.

V. Sales & Use Tax – Duplicate Invoices

DISCUSSION

Taxpayer claims the auditor included duplicate invoices in the projection calculation. Taxpayer has provided a list of these duplicated invoices. See taxpayer's protest brief page 6.

FINDING

Taxpayer's protest is sustained pending Audit verification.

VI. Sales & Use Tax – Credit

DISCUSSION

Taxpayer claims the auditor assessed tax on an invoice that included state sales tax. Taxpayer claims to have paid the invoice in total and paid the sales tax listed. Taxpayer argues credit should be given for the amount of sales tax paid on the invoice.

FINDING

Taxpayer's protest is sustained pending Audit verification.

VII. Tax Administration – Penalty

DISCUSSION

Taxpayer requests the abatement of all penalties assessed against one of the subsidiaries. Taxpayer claims the subsidiary was a wholesaler engaged in the sale of tangible personal property to a purchaser for the purpose of resale and therefore sales tax was not due. Taxpayer also claims most vendors supplying goods to the subsidiary collected sales tax and therefore use tax was not due. Taxpayer argues the subsidiary was a conscientious and dutiful taxpayer.

Pursuant to I.C. 6-8.1-10-2.1(d) the Department shall waive the penalty if a taxpayer can show the failure to pay the deficiency determined by the Department was due to reasonable cause and not due to willful neglect.

Taxpayer has shown that it's failure to pay the deficiency was due to a reasonable cause and not willful neglect.

FINDING

Taxpayer's protest is sustained.